Supreme Court, U.S.
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No. 94 470

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

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**LARRY NORRIS, Director,**
**Arkansas Department of Correction,**
*Petitioner*

v.

**DAVID LEE STARR,**
*Respondent*

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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# RESPONDENT'S BRIEF IN OPPOSITION

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---

Respondent, David Lee Starr, respectfully requests that this Court deny the petition for writ of certiorari to review the opinion in this case of the United States Court of Appeals for the Eighth Circuit, which is reported as *Starr v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994).

## STATEMENT OF THE CASE

Respondent Starr does not take issue with the discussion of the facts related to the circumstances of the offense and the events leading to his arrest and conviction, as set forth in Petitioner Norris's Statement of the Case. Mr. Starr, however, submits the following as his statement of the relevant legal considerations giving rise to the present action.

The United States District Court denied Mr. Starr's federal habeas corpus action on all grounds, and the Eighth Circuit Court of Appeals affirmed the district court with respect to the guilt phase issues raised in Mr. Starr's habeas corpus petition. The court of appeals reversed the district court and granted relief on two penalty phase issues, however, finding, first, that Mr. Starr was denied effective assistance of counsel by his trial counsels' failure to object to the submission of the aggravating circumstance that the murder was committed in an especially heinous, atrocious, or cruel manner; and second, that Mr. Starr was denied due process of law by the trial court's failure to provide him with the assistance of a psychiatric expert to develop, prepare and present mitigating evidence in the penalty phase.

In deciding this case, the court of appeals properly determined that *Ake v. Oklahoma*, 470 U.S. 68 (1985), required the appointment of a defense expert to assist in the penalty phase; the court of appeals applied the appropriate harmless error standard in determining whether Mr. Starr was prejudiced by the *Ake* violation, under the circumstances of this case; and the court of appeals properly found that Mr. Starr was denied effective assistance of counsel and that, under the circumstances of this case, resentencing was the only and proper remedy. Accordingly, the petition for writ of certiorari should be denied.

## REASONS FOR DENYING THE WRIT

I.

**THE CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT RESPONDENT WAS ENTITLED, UNDER *AKE v. OKLAHOMA*, TO THE APPOINTMENT OF A PSYCHIATRIST TO ASSIST RESPONDENT IN DEVELOPING, PREPARING AND PRESENTING MITIGATING EVIDENCE IN THE PENALTY PHASE OF HIS CAPITAL MURDER TRIAL, BECAUSE THE MENTAL HEALTH EVALUATION PROVIDED TO RESPONDENT PURSUANT TO ARKANSAS STATUTE BY THE ARKANSAS STATE HOSPITAL DID NOT ADDRESS MITIGATION**

Initially, Mr. Starr would briefly address Petitioner Norris's "perplexing" contention, *see Starr v. Lockhart*, 23 F.3d 1280, 1287 (8th Cir. 1994), that this issue is procedurally barred. The record of this case unmistakably reflects that a motion was made prior to trial (and supplemented with additional information at a later date), for a psychological expert for the purpose, *inter alia*, of evaluating Mr. Starr for mitigating evidence, and that this motion was denied by the trial court, which found that the evaluation of Mr. Starr by the Arkansas State Hospital was sufficient. While the precise issue addressed by the Eighth Circuit Court of Appeals - whether Mr. Starr was entitled to psychiatric assistance for the penalty phase of his trial - was not briefed in his direct appeal to the Arkansas Supreme Court [Mr. Starr argued only that he was entitled to psychiatric assistance on the issue of his ability to understand and waive his rights, *see Starr v. State*, 759 S.W.2d 535 (Ark. 1988), *cert. denied*, 494 U.S. 1019 (1989)], the Eighth Circuit correctly recognized that in appeals of capital cases, the Arkansas Supreme Court considers all objections and motions decided adversely to a defendant, whether specifically raised in the appeal brief or not. See Rule 4-3(h), Rules of the Arkan-

sas Supreme Court and Court of Appeals[1]; *Parker v. State*, 717 S.W.2d 800 (Ark. 1986); *Fretwell v. State*, 708 S.W.2d 630 (Ark. 1986); *Smith v. State*, 536 S.W.2d 289 (Ark. 1976). Such a review is sufficient to preserve the issue for federal habeas corpus review. *Ruiz v. Lockhart*, 754 F.2d 254 (8th Cir. 1985); *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985); *cf. Smith v. Digmon*, 434 U.S. 332 (1978) (failure of state court to address issue in opinion does not establish that the issue was not raised). Moreover, this issue was presented to the Arkansas Supreme Court in Mr. Starr's post-conviction petition pursuant to Ark. Rules Crim. Pro., Rule 37, and the court refused to grant relief on this issue, apparently including its denial in its finding that the issue had already been decided against Mr. Starr in his direct appeal.

Petitioner Norris also claims, in support of his contention that this issue is procedurally defaulted, that Mr. Starr specifically declined to raise this claim to the Arkansas Supreme Court (Petition at pp. 1, 2), although Mr. Norris does not state the grounds upon which he bases this assertion. Mr. Starr can only assume that Mr. Norris relies upon the following statement, which is found in Mr. Starr's brief to the Arkansas Supreme Court:

> The [trial] court in its original ruling was correct when it took the position set out in *Andrews v. State*, 251 Ark. 279, 472 S.W.2d 86 (1971), that due process requirements were met with regard to insanity, that it was not necessary to furnish him with a second expert witness of the defendant's choice.

This obscure statement may have been the basis for the observation in the Arkan-

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[1]Formerly Rule 11(h).

sas Supreme Court opinion that "the defense does not contend that the mental examination of Starr did not fulfill the requirements of *Ake v. Oklahoma*, 470 U.S. 68 (1985)." *Starr v. State*, 759 S.W.2d at 539. The *Andrews* case cited in Mr. Starr's appeal brief has nothing at all to do with the assertion for which counsel cited it[2], however, and what Mr. Starr's appellate counsel meant by this statement is a mystery. He did go on in the appeal brief to say that the court overlooked two more important arguments that counsel made on several occasions, one of which was that without additional psychiatric examination, counsel could not effectively represent Mr. Starr. Finally, the record does not reveal that Mr. Starr conceded that his attorneys' objection and request for expert assistance for mitigation was meritless. Therefore, because the Arkansas Supreme Court under Rule 4-3(h) considered the issue, it was not procedurally defaulted, and Petitioner Norris's argument to the contrary is meritless.

The issue here is whether Mr. Starr was entitled, under *Ake v. Oklahoma*, 470 U.S. 68 (1985), to a psychiatric expert to assist in developing, preparing and presenting evidence of mitigating circumstances in the penalty phase of his capital murder trial. It was not disputed that Mr. Starr was evaluated at the Arkansas State Hospital pursuant to Arkansas statutory provisions for competency examinations for criminal prosecutions, Ark. Code Ann. Sec. 5-2-305, or that this evaluation was "independent", *see Beard v. State*, 816 S.W.2d 860 (Ark. 1991), or that

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[2]The issues in *Andrews* were whether the trial court should have instructed the jury about the defendant's parole eligibility and whether the court should have had *ex parte* communication with certain jurors during deliberations.

the state hospital's mental health personnel were competent to perform the evaluation required by the statute. The question addressed by the Eighth Circuit, however, was whether this statutory examination was sufficient to meet the requirements of *Ake* because the examination did not encompass an evaluation for mitigating circumstances. The Eighth Circuit correctly applied *Ake* when it determined that Mr. Starr's examination did not meet due process requirements.

Petitioner Norris obfuscates the significant distinction between mental health issues constituting a defense to the crime, *i.e.*, a defendant's criminal **responsibility** for his actions, which is at issue in the guilt phase of a capital murder trial[3], and such issues in the penalty phase, where the mental health evidence is not interposed as a defense to the crime but rather as a mitigating circumstance[4], *i.e.*, as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Neal v. State*, 623 S.W.2d 191, 193 (Ark. 1976).

The issue addressed by the Eighth Circuit was not, as Mr. Norris asserts, whether Mr. Starr was entitled to "**additional** assistance of a favorable psychiatrist of his own choosing", but rather, whether Mr. Starr was entitled to psychiatric assistance **in the first instance** to develop and present relevant mitigating evidence

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[3] In Arkansas, it is an affirmative defense to a prosecution, *see* Ark. Code Ann. § 5-2-312, that a defendant lacked the capacity, as a result of a mental disease or defect, to conform his conduct to the requirements of the law or to appreciate the criminality of his conduct. Ark. Code Ann. § 5-2-305 (d) (3) and (4).

[4] Ark. Code Ann. § 5-4-605 (1), (2) and (3) sets out the statutory mitigating circumstances related to a defendant's mental condition. These include: whether the defendant was under extreme mental or emotional disturbance, whether he was acting under unusual pressures or influences, and whether his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect. None of these circumstances constitutes a defense to the crime.

in the penalty phase of his trial, evidence that was not addressed by or developed in the competency examination of Mr. Starr that was done pursuant to Arkansas law. The statute under which the examination was ordered and conducted, Ark. Code Ann. Sec. 5-2-305, addresses only the question of criminal responsibility, that is, whether the defendant suffers from a mental disease or defect that affects his capacity to form the requisite criminal intent and/or his fitness to stand trial. This statute provides, in pertinent part:

> (a) Whenever a defendant charged in circuit court:
>
> (1) Files notice that he intends to rely upon the defense of mental disease or defect, or there is reason to believe that mental disease or defect of the defendant will or has become an issue in the cause; or
> (2) Files notice that he will put in issue his fitness to proceed, or there is reason to doubt his fitness to proceed, the court ... shall immediately suspend all further proceedings in the prosecution. ...
>
> (b)(1) Upon suspension of further proceedings in the prosecution, the court shall enter an order:
>
> ...
>
> (D) Committing the defendant to the Arkansas State Hospital ... for the purpose of the examination for a period not exceeding thirty (30) days, or such longer period as the court determines to be necessary for the purpose.
>
> ...
>
> (d) The report of the examination shall include the following:
>
> (1) A description of the nature of the examination;
> (2) A diagnosis of the mental condition of the defendant;
> (3) An opinion as to his capacity to understand the proceedings against him and to assist effectively in his defense;
> (4) An opinion as to the extent, if any, to which the capacity of the

defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired at the time of the conduct alleged; and

(5) When directed by the court, an opinion as to the capacity of the defendant to have the culpable mental state that is required to establish an element of the offense charges.

Thus, the only purpose of a state hospital evaluation conducted under this statute is to determine whether a defendant has a defense to the crime (or lacks fitness to stand trial). *See Shelton v. State*, 699 S.W.2d 728, 735 (Ark. 1985) (the purpose of this statute is to prevent trial of incompetent persons and persons who lack the capacity to form the requisite criminal intent). As the Eighth Circuit correctly observed, however, under *Ake*, "... due process requires access to an expert who will conduct, not just any, but an appropriate examination." *Starr v. Lockhart*, 23 F.3d at 1289, *citing Ake v. Oklahoma*, 470 U.S. at 83. The court held that Mr. Starr's state hospital examination was not an appropriate one "because it did not delve into the mitigating questions essential to Starr." 23 F.3d at 1289. Indeed, the Arkansas Supreme Court has recognized the shortcomings of a state hospital examination under this statute for penalty phase issues. *See Coulter v. State*, 804 S.W.2d 348, 356 (Ark.), *cert. denied*, 112 S. Ct. 102 (1991), in which the court observed, "A report on these four items [Ark. Code Ann. Sec. 5-2-305 (d) (1) - (4)] is obviously not broad enough to cover everything a defendant might raise as a 'mental defect' basis of mitigation, ..." In *Coulter*, however, the court found the defendant was not prejudiced by the failure of the trial court to appoint an expert to assist in the penalty phase because Mr. Coulter's attorney had obtained the services of a psychologist with his own funds. *Id.*

This Court has consistently held that all persons who are guilty of a capital crime cannot, simply by virtue of their guilt, be subjected to the death penalty for that crime. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989); *Sumner v. Shuman*, 438 U.S. 66 (1987); *Lockett v. Ohio*; *Woodson v. North Carolina*, 428 U.S. 280 (1976). This Court has recognized that a defendant can appreciate the criminality of his conduct and be able to conform his conduct to the degree necessary to be held legally responsible for the crime, *i.e.*, to be found guilty of capital murder, but still be mentally impaired to such a degree that the ultimate penalty of death may be inappropriate. *Penry v. Lynaugh*. It is the purpose of mitigating evidence in the penalty phase to provide a method for the sentencer to make an individualized determination of the particular defendant's blameworthiness, *i.e.*, his moral culpability. *Penry v. Lynaugh*, 492 U.S. at 322-23, *citing California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J. concurring), and *Skipper v. South Carolina*, 476 U.S. 1, 13-14 (1986) (Powell, J. concurring in judgment).

The Arkansas statute under which Mr. Starr was evaluated addressed the first question but not the second. *Coulter v. State*. Accordingly, because there was no provision in the law for the evaluation of a defendant for purposes of developing, preparing and presenting mitigating evidence, the Eighth Circuit correctly determined that the examination conducted here did not provide Mr. Starr with the "basic tools" for the preparation of his defense against the death penalty, 23 F.3d at 1288, as required by *Ake*. 470 U.S. at 77. Thus, the narrow question addressed by *Starr v. Lockhart* is whether the Arkansas statutory provisions for

mental evaluations in criminal cases afford capital defendants a fair opportunity to address the issues peculiar to the penalty phase of a capital trial, as *Ake* requires. Since Arkansas law does not even suggest, much less require, that the Arkansas State Hospital do anything other than determine whether a defendant has a defense to the crime charged, and since such a determination, as a matter of law, does not encompass "everything a defendant might raise as a mental defect basis of mitigation", *Coulter v. State*, 804 S.W.2d at 356, the evaluation of Mr. Starr pursuant to the Arkansas statute was insufficient under *Ake*, as the Eighth Circuit correctly found.

Petitioner Norris misapprehends the basic principle of *Ake* when he argues, for example at p. 3 of his petition, that Mr. Starr "did not even point ... to some additional information" that a defense expert could have provided. *Ake* did not hold that a defendant is entitled to assistance if he can show what that assistance would entail. Rather, *Ake* makes it clear that when a defendant makes a *prima facie* showing that his mental condition is likely to be an issue at trial, including in the penalty phase, he is then entitled to the assistance of a psychiatrist to assist him in developing, preparing and presenting that evidence. *See Ake v. Oklahoma*, 470 U.S. at 84: "... [D]ue process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase." (Emphasis added.)

In this case, Mr. Starr made the requisite *prima facie* showing by presenting

evidence that he was mentally retarded (his IQ was 62[5], *Starr v. State*, 759 S.W.2d at 539), that he had received treatment at mental institutions for his mental retardation, and that he was raised in a seriously deprived and dysfunctional family, *Starr v. Lockhart*, 23 F.3d at 1287, which could have adversely affected his mental development. His mental retardation and its causes and effects were thus clearly established as issues in the trial as appropriate mitigating circumstances. Therefore, Mr. Starr was entitled to access to a psychiatrist's assistance "on **this** issue", *Ake v. Oklahoma*, 470 U.S. at 74. (Emphasis supplied.) Such assistance included an **appropriate** examination, *i.e.*, one directed toward evaluating these particular aspects of Mr. Starr's mental condition for the purpose of establishing valid mitigating circumstances, and to the assistance of an expert to develop and present that evidence at the penalty phase. There was no additional showing that needed to be made.

It should be mentioned, in this regard, that in the penalty phase of Mr. Starr's trial, the prosecutor repeatedly referred to Mr. Starr's mental retardation as being "mild", and he argued that such mild mental retardation was of no consequence. Mild mental retardation, however, is a significant impairment which can seriously affect a person's ability to function in society. Because he was not provided with expert assistance, Mr. Starr was unable to adduce evidence to rebut the prosecutor's mischaracterization of the extent of his impairment.

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[5]In 1993, the Arkansas legislature enacted Act 420, which forbids death sentences for the mentally retarded and creates a rebuttable presumption of mental retardation when the defendant's IQ is 65 or below. Ark. Code Ann. § 5-4-618.

Contrary to Mr. Norris's assertion at p. 5 of his petition, Mr. Starr did not contend (and the Eighth Circuit did not find) that he was entitled to an expert who would reach a biased or favorable conclusion on his behalf. He did contend, however, that he was entitled to the assistance of a psychiatrist whose responsibility it was to evaluate and develop evidence about his mental retardation **as a basis for mitigation**, rather than just as a basis for a defense to the charge. The Eighth Circuit agreed with this contention, finding that the evaluation performed by the state hospital, under the statute, was inadequate for these purposes. 23 F.3d at 1289.

Nor did the Eighth Circuit "assume" that the state hospital examination was inadequate. (Petition at p. 6) The court made a specific finding, based upon the clear and unambiguous language of the Arkansas statute and the interpretation of that statute by the Arkansas Supreme Court in *Coulter v. State*, that the evaluation was inadequate because it did not address this issue in question, *i.e.*, mitigating circumstances. 23 F.3d at 1289. Because it was not the business of the state hospital **by law** to conduct this type of evaluation, Mr. Starr was not obligated to pursue its assistance for these purposes. He made the requisite *prima facie* showing, through the state hospital report on his competency, that he had a mental condition that would be an issue at sentencing. As a result, *Ake* required that he be afforded access to an expert witness to develop this evidence as mitigating evidence.

Finally, Mr. Norris's argument - that the decision in *Starr* was, in effect, a

determination that a defendant is entitled, under the sixth amendment, to the effective assistance of experts, and as such, is a "new rule" not applicable to Mr. Starr under *Teague v. Lane*, 489 U.S. 288 (1989) - is misleading and misconstrues the rationale of *Starr*. The Eighth Circuit did not determine that the state hospital was ineffective in providing the evaluation and assistance Mr. Starr needed; rather, the court found that the state hospital did not provide appropriate assistance because such was not its mission under Arkansas law. 23 F.3d at 1289. The court's references to the testimony of the state hospital psychologist merely "illustrated", 23 F.3d at 1290, and underscored the inadequacy, for penalty phase purposes, of, and the prejudice resulting from, the type of examination provided by the state hospital.

In summary, the Eighth Circuit's decision in *Starr v. Lockhart* is entirely consistent with, and does not expand, *Ake v. Oklahoma*. It is a correct application of *Ake* to the particular circumstances of Arkansas law, and for that reason, review by this Court of that decision is unwarranted and should be denied.

II.

**THE CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE *CHAPMAN v. CALIFORNIA* HARMLESS ERROR REVIEW BECAUSE THE ERROR THE COURT FOUND IN THIS CASE WAS ONE NOT FOUND BY THE STATE COURT AND THUS ITS PREJUDICIAL EFFECT HAD NEVER BEEN DETERMINED BY A REVIEWING COURT**

The Eighth Circuit Court of Appeals, in an appeal from the district court's denial of habeas corpus relief, determined that Mr. Starr had been deprived of due process of law by the failure of the state to provide him with expert assistance to

develop and present evidence of mitigating circumstances related to his mental retardation at the penalty phase of his trial. *Starr v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994). In determining whether this error was prejudicial to Mr. Starr, the Eighth Circuit applied the standard set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967) - whether the error was "harmless beyond a reasonable doubt" - rather than the standard articulated as the standard of review of constitutional errors in habeas corpus in *Brecht v. Abrahamson*, 507 U.S. ___, 113 S. Ct. 1710, 1722 (1993) - whether the error had "substantial or injurious effect or influence in determining the jury's verdict". *Starr v. Lockhart*, 23 F.3d at 1292. Petitioner Norris contends that the Eighth Circuit's application of the *Chapman* standard was improper because the *Brecht* standard of review is now the only permissible standard of review in federal habeas corpus, regardless of whether the error has ever received a *Chapman* review.

Petitioner Norris's argument overlooks a significant distinction between *Brecht* and the instant case, however, and that is that every court that had considered the issue assigned in *Brecht*[6], including the state courts, had found there to be constitutional error. The **only** question, in any of the reviewing courts, was whether the error was harmless.

In the instant case, however, when the *Ake* issue was presented in Mr. Starr's direct appeal and in his state post-conviction proceedings under Ark. Rules

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[6]The issue in *Brecht* was whether the prosecutor improperly commented on the defendant's post-arrest silence, in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976).

Crim. Pro., Rule 37, the Arkansas Supreme Court refused to grant relief, finding that the mental examination by the Arkansas State Hospital was sufficient under *Ake*, and hence there was no deprivation of Mr. Starr's due process rights. The state court thus twice determined that there was **no constitutional error committed**, and therefore the court had no occasion to review the error ultimately found by the Eighth Circuit, under any standard, to determine whether it was harmless.

It is clear, even after *Brecht*, however, that *Chapman* analysis is a necessary component of the protection against constitutional violations and is necessary to ensure proper review of constitutional errors. This Court stated:

> State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. For these reasons, it scarcely seems logical to require federal habeas courts to engage in the **identical** approach to harmless-error review that *Chapman* requires state courts to engage in on direct review.

*Brecht v. Abrahamson*, 113 S. Ct. at 1721 (citation omitted; emphasis added).

In *Brecht*, the Court emphasized that the case had already been heard by five different courts, each had applied the *Chapman* standard, and each had reached a different conclusion as to the prejudicial effect of the error. Continued review under the identical standard in collateral proceedings was therefore found to be illogical and duplicative and to fail to afford the requisite deference to the ability of the state courts to correctly analyze and determine constitutional issues.

The instant case, however, does not involve an "identical approach to harmless-error review" under *Chapman*. The *Chapman* review by the Eighth Circuit

was the first time **any** court considered whether the deprivation of psychiatric assistance was harmless error, because this was the first occasion that a court had determined it **was** error. Clearly, had the Arkansas Supreme Court determined that Mr. Starr was entitled to an *Ake* expert, the court would then have been obliged to perform a *Chapman* review to determine whether Mr. Starr was prejudiced by the error. Had that court determined that the error was harmless beyond a reasonable doubt, however, *Brecht* would permit review of the lower court's decision by the federal court only to determine whether there was "actual prejudice". *Brecht v. Abrahamson*, 113 S. Ct. at 1722, *citing United States v. Lane*, 474 U.S. 438 (1986). *See, also, Kotteakos v. United States*, 328 U.S. 750 (1946). Since the state court did not perceive any error, however, it certainly did not make a determination whether it was harmless beyond a reasonable doubt. Because the Eighth Circuit review here was the first review of the error by any court, the review was correctly conducted under *Chapman* and not *Brecht*.

The basic philosophical underpinning of *Brecht* is not compromised by application, in this case, of the *Chapman* standard. In *Brecht*, this Court observed that state courts have an obligation to, and are fully qualified to, perform proper review of constitutional errors, 113 S. Ct. at 1721, and accordingly, a review of a constitutional error in federal court under the same standard as in the state court would threaten the state's sovereignty over criminal matters and ignore the states' interest in the finality of their decisions. *Id.* As the Court noted in *Brecht*, "Federal courts are not forums in which to **relitigate** state trials." 113 S. Ct. at 1719

(emphasis added), *citing Barefoot v. Estelle*, 463 U.S. 880 (1983). But when the question whether an error was harmless has not been litigated in the first instance, because the reviewing court found no error, the issue is not "relitigated" when the federal habeas court makes a *Chapman* review.

It is clear from *Brecht* that the *Chapman* standard of proof of harmless error is an important protection of the rights of defendants against trial errors, but it is also one that state courts can properly apply. When a state court has made the appropriate review, then federal courts have no reason to conduct the very same review. When the state court has not looked at the harmlessness of an error, however, because it did not recognize the error in the first place, however, the rationale for *Brecht*'s lower standard of review fails. As the Eighth Circuit observed:

> ...[A] state court could find a confession admissible because it was not coerced. If the confession was later found to have been coerced, its admission could not be presumed to have been determined to be harmless beyond a reasonable doubt simply because the state court had considered the issue of admissibility. In fact, it would be unusual for such an error to be harmless beyond a reasonable doubt. Thus, absent an alternative holding that even if there was error, it was harmless beyond a reasonable doubt, we will apply the *Chapman* test.

*Starr v. Lockhart*, 23 F.3d at 1292, n. 9.

Petitioner Norris's concern, at p. 11 of his petition, that requiring a *Chapman* review in cases where the state courts do not find error would encourage habeas petitioners to withhold claims until federal habeas to obtain a more favorable standard of review, is puzzling. He cites *Orndorff v. Lockhart*, 998 F.2d 1426 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1610 (1994), in which the

Eighth Circuit did consider an issue that had not been presented in state court, holding that under those circumstances the *Chapman* standard of review would be appropriate to determine prejudice. The facts of *Orndorff* distinguish that case from *Starr*, however. In *Orndorff*, the issue raised in the habeas proceedings had not been presented in state court because, it was conceded, Mr. Orndorff was not aware of the error[7] until after he had exhausted his state remedies. Hence, Mr. Orndorff did not "withhold" the issue in order to raise it in habeas.

In the instant case, however, the *Ake* issue **was** before the state court, but that court never found it to be error. Extending *Chapman* to this situation, therefore, would not counsel a defendant to "withhold" an issue until habeas. Furthermore, it is fundamental that a habeas petitioner must exhaust his state remedies before proceeding into federal court, *Rose v. Lundy*, 455 U.S. 509 (1989); *Picard v. Connor*, 404 U.S. 270 (1971), and failure to raise a claim in state court results in a procedural default that can only be excused by showing cause and prejudice for the default. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Counsel's intentional failure to raise a constitutional claim in state court, in order to obtain a more favorable standard of review in federal habeas, clearly would not constitute cause for the default. *Murray v. Carrier*, 477 U.S. 478 (1986).

III.

**THE CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT RESPONDENT'S TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO**

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[7]The prosecutor had withheld from the defense information that his chief occurrence witness had been hypnotized prior to trial.

**OBJECT TO THE "HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE AND THAT RESENTENCING IS THE APPROPRIATE REMEDY UNDER THE CIRCUMSTANCES OF THIS CASE**

At the outset, Mr. Starr wishes to correct Petitioner Norris's misstatement of the status of the law in Arkansas at the time of Mr. Starr's trial with respect to the constitutionality of the aggravating circumstance at issue. Mr. Norris defines the issue as "Whether it was error for the Eighth Circuit Court of Appeals to determine that Starr's counsel were ineffective for not challenging an aggravating circumstance, *the constitutionality of which had previously been upheld by the state court?*" (Petition at p. 18, emphasis added.) Contrary to Mr. Norris's statement, however, the aggravating circumstance at issue - that the capital murder was committed in an especially heinous, atrocious, or cruel manner - had **not** "previously been upheld" by the Arkansas Supreme Court. This aggravating circumstance was added to the statutory list of possible aggravators in 1985, and at its **first** opportunity to consider the constitutionality of this circumstance, the Arkansas Supreme Court found it to be unconstitutionally vague. *Wilson v. State*, 751 S.W.2d 734 (Ark. 1988). Therefore, Mr. Norris's statement that this circumstance had "previously been upheld" is misleading and implies that the supreme court reversed previous precedent in *Wilson*, which definitely is not the case.

Turning to the question whether Mr. Starr was deprived of effective assistance of counsel, it is undisputed that his attorneys raised no objection, either at trial or on appeal, to the constitutionality of this aggravating circumstance. Nor is it disputed that this aggravating circumstance was unconstitutionally vague, under

*Maynard v. Cartwright*, 486 U.S. 356 (1988) and *Wilson v. State*, which was decided by the Arkansas Supreme Court on the same day as *Maynard*. Therefore, had Mr. Starr's attorneys objected to the submission of this aggravating circumstance, its use would have been found to be error.

Mr. Norris contends, however, that trial counsels' failure to object to this circumstance should not constitute ineffective assistance of counsel because counsel could not have "anticipate[d] a change in the law or an extension in the law, or a clarification in the law." (Petition at p. 20.) Neither *Maynard v. Cartwright* nor *Wilson v. State* was a change, extension, or clarification of the law, however, and the Eighth Circuit properly found ineffective assistance of counsel in counsels' failure to raise this issue.

In *Maynard v. Cartwright*, this Court held that there was no functional difference between the "outrageously or wantonly vile, horrible, and inhuman" aggravating circumstance found unconstitutionally vague in *Godfrey v. Georgia*, 446 U.S. 420 (1980), and the "heinous, atrocious, or cruel" circumstance at issue in *Maynard*. The Arkansas Supreme Court reached the same conclusion in *Wilson v. State*. In *Stringer v. Black*, ___ U.S. ___, 112 S. Ct. 1130 (1992), this Court held that *Maynard* did not "break new ground" in applying *Godfrey* to the "especially heinous, atrocious, or cruel" circumstance, 112 S. Ct. at 1135, and therefore, Mr. Norris's contention that Mr. Starr's counsel should not have been

"burdened with anticipating" *Maynard* and *Wilson* is untenable[8]. As the Eighth Circuit stated:

> ..., the Supreme Court has determined that, after the 1980 *Godfrey* decision, reasonable minds could not fail to realize that the "heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague. We must therefore reject the district court's determination that counsel was not ineffective for failing to make this "novel" argument at trial. The argument was not "novel" in any sense of the word. The state's argument that Starr's counsel should not have been expected to foresee the "expansion" of *Godfrey* to *Maynard* is completely circular, because as the state itself admits, *Maynard* was not an "expansion" of *Godfrey*. *See Stringer*, 112 S. Ct. at 1135, 1140 (that *Maynard* is not a new rule is "a wise concession" by the State of Mississippi); *Newlon v. Armontrout*, 885 F.2d 1328, 1333 (8th Cir. 1989) (*Maynard* is an application of, not an extension of, *Godfrey* and is therefore not a new rule), *cert. denied*, 497 U.S. 1038 (1990). To be effective, counsel in capital cases must at least recognize and object to those sentencing factors which cannot reasonably be argued to be valid under existing law. We can conceive of no trial strategy that justifies a contrary approach, and therefore reaffirm our finding that Starr's counsel performed deficiently in failing to object to this aggravating circumstance.

*Starr v. Lockhart*, 23 F.3d at 1286.

No doubt recognizing that Mr. Starr's counsel should have challenged the aggravating circumstance, Mr. Norris next contends that "even ... failure to raise a claim that has been clearly defined" does not, in and of itself, constitute deficient performance when the decision not to raise the claim is based upon reasoned trial strategy. (Petition at p. 20.) There is no evidence whatsoever, however, that counsels' decision in this case was based on any "reasoned trial strategy" or upon anything other than lack of awareness of the existing law. As this Court has held,

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[8]It is worthy of some note that the attorneys for Messrs. Cartwright and Wilson were able to shoulder this "burden" sufficiently enough to raise the issue in the trials of these defendants.

"[C]hoices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). *Godfrey*, a landmark case in death penalty jurisprudence, was decided in 1980; counsel should have been able to discover that case with a minimal amount of research, and their failure to do so cannot be excused. As this Court stated, in the context of the responsibility of defense counsel on appeal, "Every advocate has ... the same professional responsibility ... to thoroughly research the law ..." *McCoy v. Court of Appeals of Wis.*, 486 U.S. 429, 438 (1988). The presumption that trial counsel rendered competent assistance is rebutted where trial counsel's decisions resulted from a lack of diligence in preparation and investigation. *See Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir.) (failure to investigate mitigating witnesses relates to trial preparation and not trial strategy and can be a basis of ineffective assistance of counsel), *cert. denied*, ___ U.S. ___, 112 S. Ct. 431 (1991). Clearly, therefore, the Eighth Circuit was correct in determining that counsels' performance was deficient in failing to recognize and object to this aggravating circumstance.

Even if there was deficient performance, Mr. Norris argues, there was no prejudice; rather, he contends that the Eighth Circuit "implicitly" and improperly found prejudice simply of the basis of counsels' error in permitting this circumstance to be submitted to and found by the jury. He asserts that even if there was a sufficient basis under *Godfrey* upon which to challenge this aggravating circumstance, the Eighth Circuit should not have found Mr. Starr to have been

prejudiced by the submission of this circumstance, because the jury found one other aggravating circumstance - that the murder was committed for pecuniary gain - in addition to this aggravating circumstance and no mitigating circumstances. By asserting that the Eighth Circuit found prejudice "automatically" from the erroneous submission of this aggravating circumstance, however, Mr. Norris distorts the Eighth Circuit's ruling.

The Eighth Circuit did not "presume" prejudice, as Mr. Norris contends, but instead correctly applied *Stringer v. Black* to the circumstances of this case. 23 F.3d at 1286. In *Stringer*, this Court specifically held that in weighing states such as Arkansas[9], the use of a vague aggravating factor **invalidates the sentence** and "at the very least" requires harmless error analysis or reweighing. 112 S. Ct. at 1140. The difficulty in the instant case, however, is that neither harmless error analysis nor reweighing is an available remedy, as the Eighth Circuit correctly determined. These remedies are unsuitable options because of the additional error in the trial court's failure to follow *Ake v. Oklahoma* and allow Mr. Starr access to the tools necessary to develop and present proof of a valid mitigating circumstance.

The trial court's denial of an *Ake* expert deprived the jury of mitigating evidence relevant to the determination of Mr. Starr's sentence. Had evidence of Mr. Starr's mental retardation been properly presented, the jury may well have

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[9]Under Arkansas law, a jury is required to make three findings beyond a reasonable doubt before imposing the death sentence: (1) that at least one aggravating circumstance exists; (2) that the aggravating circumstance(s) outweigh any mitigating evidence; and (3) that the aggravating circumstance(s) justify the death penalty. Ark. Code Ann. § 5-4-603.

found it to be a mitigating circumstance, as they would certainly have been permitted to do under the statutory mitigating circumstances, *see* Ark. Code Ann. Sec. 5-4-605 (3), as well as under *Penry v. Lynaugh*. Although Arkansas law does permit the Arkansas Supreme Court, when it determines that a jury has improperly found an aggravating circumstance, to conduct a harmless error review, this review can **only** be done if the court can ultimately conclude that the error would not have changed the jury's decision to impose the death penalty, *i.e.*, when there were no mitigating circumstances found, *see* Ark. Code Ann. Sec. 5-4-603(d)[10]; *Ward v. State*, 827 S.W.2d 110, 115 (Ark.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 124 (1992), and the court has not conducted this analysis where the jury found mitigating circumstances. *See, e.g., Sanders v. State*, 824 S.W.2d 353 (Ark. 1992); *Ward v. State*; *Wilson v. State*. Thus, because there was evidence of mitigating circumstances that was not presented because of the *Ake* violation, it cannot be known whether the jury might have found mitigating circumstances. Had the jury done so, the Arkansas Supreme Court would not be permitted under

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[10]This statute provides:

> On appellate review of a death sentence, if the Arkansas Supreme Court finds that the jury erred in finding the existence of any aggravating circumstance or circumstances for any reason **and if the jury found no mitigating circumstances**, the Arkansas Supreme Court shall conduct a harmless error review of the defendant's death sentence. The Arkansas Supreme Court shall conduct this harmless error review by:
>
> (1) Determining that the remaining aggravating circumstance or circumstances exist beyond a reasonable doubt; and
> (2) Determining that the remaining aggravating circumstance or circumstances justify a sentence of death beyond a reasonable doubt.
>
> (Emphasis added.)

the statute or its case law to conduct the harmless error review Mr. Norris urges.

Likewise, appellate court reweighing cannot be done in this case because the deprivation of an *Ake* expert resulted in there being insufficient evidence of Mr. Starr's mental retardation presented. Thus, although the jury might have found a mitigating circumstance if the evidence were properly presented, because the evidence was **not** presented, there is nothing in the record to weigh against the remaining aggravating circumstance to determine the effect of the erroneous submission of the vague aggravating circumstance. Mr. Norris's contention, at p. 21 of his petition, that "[t]here can be no presumption of prejudice where counsel does not adduce evidence at the penalty phase which would be mitigating evidence in an Eighth Amendment sense" simply ignores the fact that Mr. Starr was precluded from doing what Mr. Norris contends should have been done because the State refused to provide an expert witness to aid Mr. Starr in presenting that evidence.

Finally, Mr. Norris urges that, under *Walton v. Arizona*, 497 U.S. 639 (1990), the appropriate remedy would be to remand to the state appellate court "with the option of imposing a limiting construction" on the aggravating circumstance. The Arkansas Supreme Court, however, specifically declined to impose such a limiting definition of this aggravating circumstance when it was first faced with the issue, stating, "We have no better idea than the jury could have had in this case as to the meaning of the words [especially heinous, atrocious or cruel]." *Wilson v. State*, 751 S.W.2d at 738. Moreover, even if this aggravator

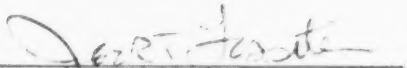
were capable of being constitutionally construed, because there was mitigating evidence that was not presented, a reviewing court would not be able to determine the effect of the unpresented evidence in determining whether the death penalty was appropriate in this case. Accordingly, only a resentencing hearing, with Mr. Starr being allowed to obtain an appropriate examination for mitigating circumstances by a defense expert, will eliminate the prejudice to Mr. Starr of the constitutional errors that occurred in his capital murder trial.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID LEE STARR

By: 

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